Supreme Court, U.S.
FILED
MAR 4 1994
OFFICE OF THE CLERK

No. 93-1063

In the Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH T. HAYWARD AND WILLIAM B. KRAUSE, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 844(h)(1), which mandates an additional penalty for a person who "uses fire * * * to commit any felony which may be prosecuted in a court of the United States," may properly be applied in federal cross-burning prosecutions.

2. Whether 42 U.S.C. 3631 is unconstitutional on its face because it prohibits threats against individuals exercising their federally guaranteed right to obtain housing without regard to race, color, religion, sex, handicap, familial status, or national origin, but does not prohibit threats based on other characteristics.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Discussion	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

R.A.V. v. *City of St. Paul*, 112 S. Ct. 2538 (1992)	4, 6, 7, 9, 10
Texas v. *Johnson*, 491 U.S. 397 (1989)	6
United States v. *Gilbert*, 813 F.2d 1523 (9th Cir.), cert. denied, 484 U.S. 860 (1987)	7
United States v. *Lee*, 935 F.2d 952 (8th Cir. 1991), petition for cert. pending, 93-1276	5, 8
United States v. *Lee*, 6 F.3d 1297 (8th Cir. 1993), petitions for cert. pending, Nos. 93-1276, 93-7412	9
United States v. *O'Brien*, 391 U.S. 367 (1968)	6

Constitution and statutes:

U.S. Const. Amend. I	4, 5, 6, 9
Fair Housing Act, 42 U.S.C. 3601 *et seq.*	6
42 U.S.C. 3631	2, 3, 4, 5, 6, 7, 8, 9, 10
42 U.S.C. 3631(b)	6
18 U.S.C. 115	10
18 U.S.C. 241	3, 7, 10
18 U.S.C. 245	10
18 U.S.C. 245(b)(2)	7
18 U.S.C. 844(h)	2
18 U.S.C. 844(h)(1)	3, 4, 5, 7, 8
18 U.S.C. 871	10
18 U.S.C. 875(c)	10
18 U.S.C. 876	10

Statutes—Continued: Page

18 U.S.C. 879 10
18 U.S.C. 924(e)(1) 3
18 U.S.C. 1512(b)(1) 3
18 U.S.C. 1513 10

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1063

KENNETH T. HAYWARD AND WILLIAM B. KRAUSE, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 6 F.3d 1241. The opinion of the district court denying petitioners' motion for judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial (Pet. App. 43-56) is reported at 772 F. Supp. 399.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42) was entered on October 5, 1993. The petition for a writ of certiorari was filed on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 844(h) and 42 U.S.C. 3631, the two statutory provisions involved in this case, are reprinted at pp. 2-3 of the petition.[1]

STATEMENT

1. On Labor Day weekend, 1989, petitioner Krause burned two crosses on the driveway of the Joneses, a white family living in Keeneyville, Illinois. Pet. App. 2-3. Petitioner Hayward built and participated in burning the second of these crosses. *Id.* at 3. The Joneses had entertained black guests in their home during that weekend. *Id.* at 2.

Petitioner Krause burned the first cross with the assistance of Thomas Miller and Steven Randall. Pet. App. 2. The finished cross stood six and a half feet high and was four and a half feet wide. *Ibid.* After Miller covered the cross with a mixture of gasoline and petroleum jelly, the three men carried it with a cement cinder block to the Joneses' house at about 8:00 that night. *Ibid.* They first placed the cross in the cinder block on the edge of the driveway, and Krause attempted to light it. *Id.* at 2-3. When the cross did not light, Krause got more gasoline. The men moved the cross further up the driveway and doused it with gasoline; Krause lit it, and all three fled. *Id.* at 3.

Later the same night petitioner Hayward built the second cross, which stood seven feet high and was five

[1] In one respect, however, 42 U.S.C. 3631 is inaccurately reprinted in the petition. The phrase "handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title)" appears after the word "sex" in subsections (a), (b)(1), and (c).

feet wide. Pet. App. 3. Hayward, Miller, and Krause soaked the cross in diesel fuel, drove it to the Joneses' house in a truck, and placed it in the same cinder block that had held the first cross. *Ibid.* Hayward lit the cross, and the three men sped away in the truck. *Ibid.* Miller testified that, as they drove away, Hayward fired a handgun five or six times at the house. *Id.* at 3 n.2; Tr. 414-416.

A neighbor saw the second cross burning and awoke Pam Rayan, a member of the Jones family. Pet. App. 3. Rayan and her children saw the second cross and were frightened by it. *Ibid.* The neighbor called the fire department because the burning cross threatened to set a nearby tree on fire. *Ibid.*

2. Petitioners were indicted by a federal grand jury. They were charged with felony conspiracy to violate civil rights, in violation of 18 U.S.C. 241; use of fire to commit a federal felony, in violation of 18 U.S.C. 844(h)(1); criminal interference with housing rights, in violation of 42 U.S.C. 3631; and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Krause was also charged with intimidating and threatening a witness in connection with the investigation of the crime, in violation of 18 U.S.C. 1512(b)(1). Pet. App. 4.

After a jury trial, Krause was found guilty on all counts. Pet. App. 61-62. Hayward was acquitted on the Section 924(c)(1) charge but was found guilty on all other counts. Pet. App. 57-58. Petitioners filed a joint motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial, which the district court denied. See *id.* at 43-56. In denying the motion, the district court rejected petitioners' contention that Section 844(h)(1) was

inapplicable to their conduct because there had been no damage to persons or property. Pet. App. 44-45. The district court also rejected petitioners' contention that their convictions violated their First Amendment rights. Pet. App. 50-53.

3. On appeal, petitioners challenged their convictions on several grounds, two of which are relevant here. They contended (Hayward C.A. Br. 18-28, Krause C.A. Br. 6) that 18 U.S.C. 844(h)(1) was intended to apply only to cases of arson involving damage to property or persons. Petitioners also argued that their convictions under 42 U.S.C. 3631 violated their First Amendment rights. Hayward C.A. Br. 41-50; Krause C.A. Br. 6.[2] They did not contend that the evidence in this case was insufficient to establish a violation of Section 3631. Nor did they claim that the application of Section 844(h)(1) to their conduct violated the First Amendment.

[2] Relying on this Court's opinion in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), petitioners argued (Hayward C.A. Br. 45) that "42 U.S.C. § 3631(b) applies only to the subject of race. Arguably, the statute allows force or the threat of force, with an abusive [invective] no matter how vicious or severe, unless addressed to a racial topic. As in *R.A.V.*, the statute in the instant case prohibits bias-motivated hatred and messages based on racial supremacy. Applying the Court's analysis from *R.A.V.*, 42 U.S.C. § 3631 is content-based and facially unconstitutional."

Petitioner's characterization of the statute is factually inaccurate. The coverage of Section 3631 is not limited to race-based threats. Rather, the statute prohibits the use or threat of force for the purpose of preventing individuals from exercising their rights to obtain housing free from discrimination based on race, color, religion, sex, handicap, familial status, or national origin.

The court of appeals affirmed. Pet. App. 1-41. In upholding petitioners' convictions under Section 844(h)(1), the court concluded that the language of the statute was "clear and unambiguous" and applied to petitioners' conduct:

> Section 844(h)(1) states in simple, clear terms that "[w]hoever . . . uses *fire* or an explosive *to commit any felony* which may be prosecuted in a court of the United States . . . shall . . . be sentenced to imprisonment for five years[.]" * * * The language of the statute does not limit itself to the prosecution of arson cases, as the defendants urge us to conclude. Had Congress wanted to so limit the statute, it could have easily inserted the word "arson" into the statute. *See Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993).

Pet. App. 7. Because the petitioners "used fire to burn two crosses in order to commit the felony of violating the civil rights of the inhabitants of the house," they were guilty of violating Section 844(h)(1). Pet. App. 7.

The court acknowledged that the Eighth Circuit had reached a contrary conclusion in *United States* v. *Lee*, 935 F.2d 952 (1991), petition for cert. pending, No. 93-1276. It stated, however, that "because the *Lee* court bypassed the clear and unambiguous language of section 844(h)(1), we reject its determination that section 844(h)(1) does not apply to cross burnings done to violate another's civil rights under 18 U.S.C. § 241." Pet. App. 12.

The court of appeals also rejected petitioners' First Amendment challenge to Section 3631. Pet. App. 13-19. A majority of the court found that while "the cross burnings here involved some degree of expres-

sive conduct," *id.* at 15 (citing *R.A.V.*, 112 S. Ct. at 2541 & n.1, 2544, 2550), the petitioners' conduct was not entitled to First Amendment protection. Pet. App. 16.

Relying on *Texas* v. *Johnson*, 491 U.S. 397, 403 (1989), and *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), the majority first considered "whether the government's regulation of [petitioners'] conduct was related to the suppression of free expression." Pet. App. 16. It concluded (*ibid.*) that

> [t]he purpose of section 3631(b) is to protect the right of an individual to associate freely in his home with anyone, regardless of race. To achieve that end, the statute prohibits acts of willful intimidation against people based on race. The statute, then, is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech. See *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2200-2201 (1993).

The majority therefore applied the standard of review set forth in *O'Brien*, 391 U.S. at 377. Section 3631, it held, is "sufficiently justified" because it "furthers an important or substantial governmental interest; * * * the governmental interest is unrelated to the suppression of free expression; and * * * the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Pet. App. 17 (quoting *O'Brien*, 391 U.S. at 377). The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, of which Section 3631 is a part, "was a proper exercise of the government's power under the Thirteenth Amendment." Pet. App. 17. Section 3631(b) itself "advances an important and

substantial governmental interest by protecting a person's right to occupy a dwelling without fearing threats or intimidation based on race." Pet. App. 17. And the statute is narrowly tailored because it does not prohibit cross-burning "as a form of expressive conduct" (*ibid.*); rather, in burning the crosses, the petitioners had "willfully inte ded to threaten and intimidate those in the Jones household for entertaining black people in their home." *Id.* at 18 (citing *United States* v. *Gilbert*, 813 F.2d 1523, 1529 (9th Cir.), cert. denied, 484 U.S. 860 (1987)). The expressive content of petitioners' act, the court held, was "swept up incidentally within the reach of a statute directed at conduct rather than speech." Pet. App. 18 (quoting *R.A.V.*, 112 S. Ct. at 2546-2547). Judge Flaum joined the court's analysis of Section 844(h)(1) but concurred separately with respect to the validity of Section 3631. Pet. App. 32-41.

DISCUSSION

Although the court of appeals correctly decided both questions presented by the petition in this case, we believe that review by this Court is appropriate. In 1993 alone, the United States brought to trial or accepted pleas in prosecutions involving ten separate cross-burning incidents, and the government continues to investigate new cross-burning incidents for possible future prosecution. Defendants in these cases are generally charged with violations of 18 U.S.C. 844(h)(1), 18 U.S.C. 241, and either 42 U.S.C. 3631 or 18 U.S.C. 245(b)(2), a similar statute applicable to interference with attendance at a public school or college, use of public facilities, employment, or other federally protected activities. The legal challenges pressed by petitioners here are invoked by

defendants in the large majority of these prosecutions. Thus, both questions presented by this petition are likely to arise frequently in the future.

There is a square conflict between the Seventh and Eighth Circuits as to the applicability of 18 U.S.C. 844(h)(1) to cross-burning prosecutions. While there is no circuit conflict on the second question presented, it is an issue of substantial importance to the enforcement of federal criminal civil rights laws. We believe that a definitive resolution by this Court would greatly assist the federal government's prosecution of civil rights offenses.

1. Section 844(h)(1), 18 U.S.C., provides that an individual who "uses fire * * * to commit any felony which may be prosecuted in a court of the United States" shall be subject to a mandatory additional sentence of five years' imprisonment. The Seventh Circuit's ruling that the statute applies in this case squarely conflicts with the decision of the Eighth Circuit in *United States* v. *Lee*, 935 F.2d 952 (1991).[3] Indeed, the court of appeals here acknowledged the conflict but concluded that the *Lee* court had "bypassed the clear and unambiguous language of section 844(h)(1)." Pet. App. 12.

In our view the Seventh Circuit's resolution of this issue is correct. In light of the square circuit conflict and the significance of the question presented, however, we believe that review by this Court is warranted.

2. Petitioners contend that Section 3631 is facially invalid because it prohibits only bias-motivated inter-

[3] On February 4, 1994, the United States filed a petition for a writ of certiorari in *Lee*, No. 93-1276, and asked the Court to hold that petition pending resolution of this case.

ference with housing rights and does not proscribe threats of force generally. Challenges of this nature have been made by defendants in nearly every federal cross-burning prosecution since this Court's decision in *R.A.V.* A definitive resolution of the issue by this Court is of substantial importance to the vigorous enforcement of federal civil rights laws. Despite the absence of a circuit conflict regarding the validity of Section 3631, we believe that the question is of sufficient importance to warrant this Court's review.[4]

Indeed, petitioners' contention that Section 3631 violates the First Amendment by proscribing some threats but not others would, if accepted, cast doubt upon a broad range of federal criminal statutes. See,

---

[4] The absence of a circuit conflict should not obscure the fact that *R.A.V.* has created substantial uncertainty regarding the appropriate legal analysis to be applied when government singles out for prohibition particular categories of unprotected speech or expressive conduct. In the present case, for example, although the court of appeals unanimously affirmed petitioners' convictions, the majority and the concurrence divided sharply in their reasoning. Compare Pet. App. 13-19 (42 U.S.C. 3631 is consistent with the First Amendment because it is directed at conduct, not expression) with Pet. App. 38 (Section 3631 is consistent with the First Amendment because it focuses not on the content of the threat "but rather on the choice of victim or on the motive of the person making the threat").

The application of First Amendment principles to federal cross-burning prosecutions has been a source of confusion in other respects as well. For example, in *United States* v. *Lee*, 6 F.3d 1297 (8th Cir. 1993) (en banc), petitions for cert. pending, Nos. 93-1276, 93-7412, both the plurality opinion and a separate opinion concurring in part and dissenting in part combined the standards to be applied in prosecutions for *advocating or inciting* violence with those to be applied in prosecutions for *threatening* violence. See 6 F.3d at 1302-1304; *id.* at 1307.

e.g., 18 U.S.C. 115 (threats to assault, kidnap, or murder a federal official or his family); 18 U.S.C. 241 (conspiracy to injure, oppress, threaten, or intimidate those exercising any right guaranteed by federal law); 18 U.S.C. 245 (use of force or threat of force against those who exercise enumerated federal rights); 18 U.S.C. 871 (threats against the President or successors to the presidency);[5] 18 U.S.C. 875(c) (interstate transmission of threats to kidnap or injure); 18 U.S.C. 876 (transmission by mail of threats to kidnap or injure); 18 U.S.C. 879 (threats against former Presidents); 18 U.S.C. 1513 (threats of injury to person or property of witnesses or informants). Nor could petitioners' contentions plausibly be limited to symbolic speech such as the cross burnings at issue here. Rather, under petitioners' interpretation of *R.A.V.*, Section 3631 could not constitutionally be applied to express verbal threats of violence intended to dissuade individuals from the exercise of their federal right to obtain housing on a nondiscriminatory basis. The broad implications of petitioners' argument underscore the significance of the question presented.

For more than a century, the burning cross has been used as a symbol of terror. It has been, as the court of appeals recognized, "a precursor to physical

[5] This Court noted in *R.A.V.* that "the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." 112 S. Ct. at 2546.

violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy." Pet. App. 15 (internal quotation marks omitted). In the last decade of the Twentieth Century, cross burnings are still occurring with alarming frequency. When a cross is burned with the intent to threaten and intimidate those who are exercising their federally guaranteed rights, the United States is determined to prosecute those responsible. This Court should make clear that its decision in *R.A.V.* does not cast doubt upon the propriety of these prosecutions.

CONCLUSION

The court should grant review of the questions as set forth in this brief.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

MARCH 1994